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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] /

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Appellants,

versus

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, INTERVENING COMPLAINANT.

JOHN ST. PAUL, JR.,
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of the Port of New Orleans.

WM. C. DUFOUR,
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(35,666)

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IN THE
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Appeal from the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, INTERVENING COMPLAINANT.

May It Please the Court:

ASSIGNMENT OF ERROR.

This brief is intended to cover only the assignment of error reading as follows:

> "25. (a) The District Court erred in failing and refusing to find that the orders of the Commission violate that part of clause 5 of Section 9 of Article I of the Constitution of the United States reading as follows: " 'No preference shall be given by any regulation of commerce * * * to the ports of one state over those of another.' "

(b) The District Court erred in failing and refusing to find that the orders of the Commission violate that part of clause 5 of section 9 of Article I of the Constitution of the United States reading as follows: " 'Nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another.' " (Page 3595 of printed record).

SUMMARY OF POINTS UPON WHICH INTERVENOR RELIES.

—A—

The order complained of herein violates that part of Clause 5 of Section 9 of Article I of the Constitution of the United State reading as follows:

> "No preference shall be given by any regulations of commerce * * * to the ports of one State over those of another."

(A) (1) The history of the clause shows that the order attacked violates this provision.

(A) (2) An analysis of the decisions shows that the order violates this provision.

—B—

The order complained of herein violates that part of Clause 5 of Section 9 of Article I of the Constitution of the United States, reading as follows:

> "Nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another."

ARGUMENT.

This cause originated in a proceeding brought by the Galveston Commercial Association against the Galveston, Harrisburg and San Antonio Railroad Co., et als. (Page 3346 of printed record). Stripped of camouflage it is the effort of a Port (the Port of Galveston) or group of Ports (the Ports of Texas) to have the Interstate Commerce Commission issue orders, under the guise of regulating railroad rates, to develop and increase their business at the expense of the Port of New Orleans.

We believe that a consideration of the history of the adoption of Clause 5 of Section 9 of Article I of the Constitution of the United States, and a consideration of the jurisprudence growing out of the interpretation and/or construction of this clause, will show that Congress and/or the Interstate Commerce Commission have no such power.

And we believe that a consideration of the record and of the orders of the Interstate Commerce Commission herein will show that this is what has been attempted and carried into execution by the orders of the Interstate Commerce Commission herein.

(A) (1) Before going into a discussion of our proposition that the order entered herein by the Interstate Commerce Commission is a violation of two of the provisions of said clause of the Constitution, we wish to set out herein the history of the clause and the discussion concerning it in the Convention.

HISTORY OF CLAUSE.

The Constitutional Convention met May 2nd, 1787. It was May 14th before a quorum was **present.**

From "Documentary History of the Constitution of the United States of America derived from the records, manuscripts and rolls deposited in the Bureau of Rolls and Library of the Department of State, Volume 3", printed by direction of Congress and on file in the Government Depositary at the New Orleans Public Library (hereinafter referred to as D. H.) we learn at page 444, that on Monday, August 6th, the draft under consideration contained as

Article VII, Section 4, the following:

> "no tax or duty shall be laid by the Legislature on articles exported from any State, nor on migration or importation of such persons, etc. * * *; nor shall such migration or importation be prohibited."

Section 5 referred to a capitation tax.

Section 6 referred to navigation laws.

On Wednesday, August 22nd, the last part of Section 4 and Section 5, Article VII, were sent to a Committee (Jas. Madison Reports by Elliott, p. 461) (D. H. Vol. 3, p. 592) composed of one representative from each State.

On Friday, August 24th, the Committee made its report:

Section 4; that the migration or importation of such persons * * * shall not be prohibited by legisla-

ture prior to the year 1800; but a tax or duty may be imposed * * * at a rate not exceeding the average of the duties laid on imports.

Section 5; remained the same.

Section 6; struck out.

which was allowed to lie over. (D. H. Vol. 3, p. 606).

On Saturday, August 25th, the time limit was changed to 1808, and a tax allowed not exceeding $10.00. (D. H. Vol. 3, pp. 616 and 619); and on that same date, Mr. Carroll (Md.) and Mr. Luther Martin (Md.) moved to agree to the following proposition: (See D. H. Vol. 1, p. 156); James Madison reports by Elliott, p. 479; Elliott Debates (2nd Ed.) p. 296.

> "The legislature * * * shall not oblige vessels * * * to enter or pay duties on imports in any other State than in that to which they may be bound or to clear out in any other than the State in which their cargo may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering, clearing out or paying duties on imports in one State in preference to another."

and same was referred to a Committee of one from each State composed of Langdon, Gorham, Sherman, Dayton, Fitzsimmons, Read, Carroll, Mason, Williamson, Butler and Few. For names of Committee see *Federal Statutes Annotated, 2nd Ed., Vol. 10, p. 184.*

On the same day McHenry and Charles Cotesworth Pinckney moved the following resolution, which was at once referred to the same Committee:

> "Should it be judged expedient by the legislature of the United States, that one or more ports for collecting duties or imposts other than those ports of entrance and clearance already established by the respective states, should be established, the legislature of the United States shall signify the same to the executives of the respective states, ascertaining the number of such ports judged necessary, to be laid by the said executives before the legislatures of the states at their next session; and the legislature of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any state, except the legislature of each state shall neglect to fix and establish the same during their first session to be held after such notification by the legislature of the United States to the executive of each state."
>
> "All duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States." *(Federal Statutes Annotated, 2nd Ed., Vol. 10, P. 184-5).*

On Tuesday, August 28th, (See Madison Report by Elliott, p. 483; D. H. Vol. 1, p. 162; Elliott's Debates, [2d Ed.], p. 300), the Committee reported back: that the following be inserted after the 4th Clause of Section VII:

> "nor shall any **regulation of commerce or revenue** give preference to the ports of one State over those of another or oblige vessels bound to or from any State to enter, clear or pay duties in another * * *."

On Friday, August 31st, (See Madison Reports by Elliott, pp. 478, 503; D. H. Vol. 3, pp. 660-1; Elliott's Debates [2d Ed.], p. 342), the following was agreed to:

> "nor shall any regulation of **commerce** or **revenue** give preference to the ports of one State over those of another; or oblige vessels bound to or from any State to enter, clear or pay duties in another."

The vote was: Conn., N. J., Pa., Del., Md., Va., N. C., Ga. for; and N. H. and S. C. against. (D. H. Vol. 3, p. 661).

Mr. Carroll (Md.) and Mr. Martin (Md.) expressed their apprehension and the probable apprehension of their constituents that **under the power to regulate trade the Legislature might favor the ports of particular States by requiring vessels destined to or from other States to clear or enter thereat; as vessels belonging or bound to Baltimore to enter or clear at Norfolk.**

Mr. Madison thought it would be a great inconvenience in the Delaware River not to be able to force vessels to enter below Pennsylvania.

Mr. Fitzsimmons (Pa.) thought it would be a greater **inconveniency** to force boats bound for Philadelphia to enter before they reached Pennsylvania territory.

Mr. Gorham (Mass.) and Mr. Langdon (N. H.) suggested that at the Port of New York smuggling might take place at Sandy Hook.

Mr. McHenry (Md.) said the vessels could be made to take on officers of the Government before reaching the ports.

The Committee on Style does not seem to have reported this clause at all, but on September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the part of it having relation to the subject under consideration here was on motion inserted in the Constitution as an amendment in the following form:

> "No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another." *(Federal Statutes Annotated, 2d Ed., Vol. 10, p. 185).*

A reference to *Knowlton v. Moore, 178 U. S., pp. 103-107,* confirms the substantial correctness of this Historical revue.

MR. LUTHER MARTIN'S LETTER.

We should then like to call attention to the following part of a letter written by Mr. Luther Martin of Maryland to the Legislature of Maryland, which may be found in Elliott's Debates, 2nd Edition, Page 381, or "In Secret Debates of the Constitutional Convention from notes taken by Robert Yates, Chief Justice of New York," and copied by John Lansing, Jr.:

> "In this same section there is a provision that no preference shall be given to the ports of one State over another, and that vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another. This provision, as well as that which relates to the uniformity of impost

duties and excises, was introduced, sir, by the delegation of this State—Without such a provision, it would have been in the power of the general government to have compelled all ships sailing into, or out of Chesapeake, to clear and enter at Norfolk, or some port in Virginia—a regulation **which would be extremely injurious to our commerce,** but which would, if considered merely as to the interest of the union, perhaps not be thought unreasonable, since it would render the collection of the revenue arising from commerce more certain, and less expensive.

But, sir, as the system is now reported, the general government have a power to establish what ports they please in each State, and to ascertain at what ports in every State ships shall clear and enter in such State; a power which may be so used as to destroy the effect of that provision, since by it may be established a port in such a place, as shall be so inconvenient to the State, as to render it more eligible for their shipping to clear and enter in another, than in their own States. Suppose, for instance, the general government should determine, that all ships which cleared or entered in Maryland, should clear and enter at Georgetown, on Potomac, it would oblige all the ships which sailed from, or were bound to, any other port of Maryland, to clear or enter in some port in Virginia. To prevent such a use of the power which the general government now has of limiting the number of ports in a State, and fixing the place or places where they shall be, we endeavored to obtain a provision, that the general government should only, in the first instance, have authority to ascertain the number of ports proper to be established in each State, and transmit information thereof to the several States, the legislatures of which, respectively, should have the power to fix the places where those ports should be, according to their idea what would **be most advantageous to the commerce of their State, and most for the ease and convenience of their citizens;** and that the general

government should not interfere in the establishment of the places, unless the legislature of the State should neglect or refuse so to do; but we could not obtain this alteration."

In arriving at the meaning of this clause of the Constitution, we must bear in mind what the delegation from Maryland sought to accomplish. We must bear in mind that many compromises were made to insure the adoption of the Constitution, and we must bear in mind that this provision was written into the Constitution at the behest of the Maryland delegation supported by Pennsylvania and with only two dissenting votes on the representation to the Convention that the people of Maryland apprehended that under the **power to regulate trade** the central government might favor the ports of particular states by requiring vessels destined to or from other states to clear or enter thereat; as vessels belonging or bound to Baltimore to enter or clear at Norfolk.

The gentlemen from Maryland and their constituents were not straining at a gnat. It made no difference to them whether a boat did or did not call at Norfolk for the purpose of paying duties or for any other purpose. What they feared was that if the boats were **forced** to call at Norfolk, they might discontinue calling at Baltimore and that the city of Baltimore would thereby **be deprived of its commerce.**

Mr. Fitzsimmons of Pennsylvania in answer to Mr. Madison's plea of convenience was very quick to resent the idea of stopping boats bound for Philadelphia at any

other point on the Delaware. It is ridiculous to suppose that it made any difference to Pennsylvania whether their boats stopped elsewhere or not to pay duties or for any other purpose. What they feared was that if the boats were **forced** to stop at other points, they might discontinue stopping at Philadelphia and **deprive Philadelphia of its commerce.**

It is apparent that in the hopes of having the people of Maryland ratify the Constitution, the other gentlemen of the Convention acceded to the position of Maryland (just as they did to Georgia and South Carolina on the slavery question) and placed upon the power granted the central government under the Commerce Clause the restriction in the Fifth Clause of the Ninth Section of the First Article.

The history of this clause and the letter of Mr. Martin show plainly that Mr. Martin endeavored to even deprive the central government of the right to name ports of entry and that amongst Mr. Martin's reasons for refusing to sign the Constitution of the United States was that the Convention refused to place this limit on the power of the central government.

Mr. Martin and those interested in securing this restraint upon the Commerce Clause were statesmen and those with whom they dealt in the Convention were not tricksters.

If it had been suggested to Mr. Martin that all of the ports of one state must be preferred to all of the ports of another, it is apparent that not for one second would

he have countenanced the clause as it stood, and in his letter to the legislature of Maryland, he most assuredly would have given that as an additional reason for refusing to sign.

It is entirely incomprehensible that the Convention would have incorporated into the Constitution a prohibition which could have been defeated by the simple political expediency of including all ports but one, or of including all of the important ports or the one important port, and excluding those of no importance. Mr. Martin was protecting Baltimore (a particular port) against Norfolk (a particular port).

From the history of the clause and the discussions, we believe that the Fifth Clause of the Ninth Section of Article One is a limitation upon the power conferred in the Commerce Clause. That it limits the power of Congress or the Interstate Commerce Commission in its regulations concerning commerce and forbids any regulation of export or import commerce which directly gives a preference to any substantial port in one state over any substantial port in another, and certainly when it gives a preference to all the substantial ports in one state over the only substantial port in another, or when it regulates rates in order to build the business of one port at the expense of another—**it means that or it means nothing.**

That it is a limitation upon the powers of Congress is set out by Chief Justice Marshall in *Gibbons v. Ogden* in the following words:

> "If, then, there are in the constitution plain **exceptions from the power over navigation, plain**

inhibitions to the exercise of that power in a particular way, it is proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th Section of the 1st article declares that 'no preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another'. This clause cannot be understood as applicable to those laws only which are passed for the purpose of revenue because it is **expressly applied to commercial regulations;** and the most obvious preference which can be given to **one** port over **another in regulating commerce,** relates to navigation."

Mr. George Ticknor Curtis in his history of the origin, formation and adoption of the Constitution of the United States has commented on the history of this clause as follows:

"General commercial and revenue powers, then, without other restrictions than those, would enable Congress to collect their revenues where they should see fit, without obliging them to adopt the old ports of entry of the States, or to consider the place where a cargo was to be unladen. They might have custom houses in only one place in each State, or in only such States as they might choose to select, and might thus compel vessels bound from or to all the other States to clear or enter at those places. But on the other hand, a constitutional provision which would require them to establish custom houses at the old ports of entry of the States without leaving them at liberty to establish other ports of entry or to compel vessels to receive on Board Revenue officers before they had reached their port of destination would create opportunities and facilities for smuggling.

> It appears that the people of Maryland felt some apprehension that an unrestrictive power to make **commercial** and **fiscal** regulations might result in compelling vessels bound to or from Baltimore to enter or clear at Norfolk or some other port in Virginia. The delegates of Maryland accordingly introduced a proposition which embraced two ideas; **first,** that Congress shall not oblige vessels domestic or foreign, to enter or pay duties on imports in any other State than in that to which they may be bound, or to clear from any other State than that in which their cargoes may be laden; **secondly,** that Congress shall not **induce vessels to enter or clear** in one State in preference to another by **any privileges or immunities.** This proposition became the basis of that clause of the Constitution which declares that 'no preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear or pay duties in another."

It might be urged that the restriction as to preference applied only in a limited way concerning vessels, such as restriction of loading, unloading, etc.

However, when the Commerce Clause from which the Interstate Commerce Commission derives its power was adopted, there were no railroads, there were none contemplated or even imagined and yet when they came into existence, the Courts very properly construed the power to regulate commerce as a power to regulate railroads and their rates, even though the regulation of railroad rates could not have been within the contemplation of the framers of the Commerce Clause.

The same rules and principle of law which have caused the Courts to broaden the Commerce Clause to include railroads and railroad rates, must of necessity cause the Courts to include in the regulations of commerce by which preference between ports are forbidden the regulation of railroad rates on import and export shipments.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable."
>
> *South Carolina v. United States, 199 U. S. 448-9.*

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed". Fairbanks v. United States, 181 U. S. 289.

Moreover, in *Gibbons v. Ogden, 9 Wheaton, page 4,* commerce has been defined as follows:

> "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and **is regulated by prescribing rules for carrying on that intercourse."**

And in *Addyston Pipe & Steel Co. v. United States, 175 U. S. 241,* commerce has been defined as follows:

> "As has been frequently said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes **not only the transportation of persons and property** and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Reading into Clause 5, the definition of the *Addyston* case, the clause reads as follows:

> "No preference shall be given by any regulation of 'transportation of persons and property' to the ports of one State over those of another."

And in *Gibbons v. Ogden,* Chief Justice Marshall has said:

> "The 9th Section of the 1st article declares that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.' This clause cannot be

understood as applicable to those laws only which are passed for the purpose of revenue, because it is **expressly applied to commercial regulations.**"

From all of which it will be seen that the prohibition against preferences between ports includes a preference by a regulation of railroad rates.

Whilst it may be that a *bona fide* regulation of railroad rates which incidentally grants a preference to one port over another is not unconstitutional, we believe that any attempt to equalize the business of different ports and or to give a preference to one port over another under the guise of regulating railroad rates is unconstitutional and violates Section 9 of Article I of the Constitution of the United States.

(A) (2) In the case of *Pennsylvania v. Wheeling, 18 How. 433*, wherein the permission by Congress for the construction of a bridge was given and the argument was made that because of the inconvenience and possible added cost of navigation, due to the existence of the bridge, the port of Wheeling was preferred over the port of Pittsburg, the Court held:

"There are many acts of Congress passed in the exercise of its power to regulate commerce, providing for a special advantage to the port or **ports** of one state and which very advantage may **incidentally** operate to the prejudice of the **ports** in a neighboring state which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of light houses, * * * may be referred to as examples."

This finding was sufficient to decide in that case that the Fifth Clause of the Ninth Section of Article 1 was not violated. Consequently, the doctrine subsequently announced in that case that the said clause means:

> "Discrimination between all the ports of one state and all the ports of another state"

was *obiter dicta*, and incorrect.

The best proof of the **incorrectness** of the statement that the preference forbidden is a preference of all the ports of one state over all the ports of another is to ask the question:

> "If Wheeling and Pittsburg had been the only ports in Pennsylvania and West Virginia, would the decision have been different?"

And to ask the question:

> "If the port in South Carolina and the port in Georgia, between which it was sought to show there had been created a preference by certain river improvements, had been the only ports in the states of South Carolina and Georgia, would the decision have been different?"

To answer the questions is to admit our contention.

We believe that the first enunciated doctrine is correct, to-wit: that there is no violation of the clause if the preference or prejudice is an **incidental** one, provided the **purpose** of the action is not to favor one Port over another; and that the second enunciated was *obiter dicta* and erroneous.

In the same case the Court further said:

> "Besides, it is a mistake to assume that congress is forbidden to give a preference to a port in

> one State over a port in another. Such preference is given in every instance where it makes a port in one State a port of entry, and refuses to make another port in another State a port of entry. No greater preference, in one sense can be more directly given than in this way; and yet, the power of congress to give such preference has never been questioned. Nor can it be without asserting that the moment congress makes a port in one State a port of entry, it is bound, at the same time, to make all other ports in all other States ports of entry." * * *

That this preference as to creating ports of entry is allowed there can be no question. But the conclusion drawn therefrom is refuted by the authority quoted to substantiate it. The history of this clause shows that Mr. Luther Martin of Maryland attempted to have the clause so worded that Congress could only indicate that it intended to create ports of entry in a state and that thereupon the power to name the particular port of entry would rest with the state legislature, Congress only having the right to name the port of entry in the event of a default by the state legislature. This provision was refused, thereby proving that it was the definite intention of the Convention that the central government could name the ports of entry, even though that constituted a preference. Mr. Luther Martin refused to sign the constitution. This was one of the specific grounds upon which he refused to sign. However, he did not make any objection to the clause as adopted on the ground that, for it to apply, **every** port in one state would have to be preferred over **every** port in another state. If that were a correct construction of the clause, Mr. Martin would certainly have given that as another reason for his refusal to sign the constitution.

In considering a question of revenue in *Knowlton v. Moore, 178 U. S., p. 106*, Associate Justice Edward Douglas White gave to another part of Mr. Luther Martin's letter to the Maryland Legislature the same force and authority for which we argue here.

He said:

> "We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. Thus in the report made to the legislature of Maryland by Luther Martin, attorney general of the State, detailing and commenting upon the proceedings of the convention of 1787, of which convention Mr. Martin was a delegate, in the course of comments upon the tax clause of the Constitution Mr. Martin said (1 Ib. p. 369):
>
> "Though there is a provision that all duties, imposts and excises shall be uniform—THAT IS, TO BE LAID TO THE SAME AMOUNT ON THE SAME ARTICLES IN EACH STATE—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States, and of absolute necessity for the use and consumption in others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, to-wit, the States which use and consume the articles on which imposts and excises are laid."

In the case of *South Carolina v. Georgia, 93 U. S., p. 4*, the Federal Government placed an obstruction in a river which contained two channels. The object of the

obstruction was to force the water through one channel thereby improving the navigation of that channel. The contention was made that this constituted a preference of the ports of one state over those of another.

This was overruled by the court on the strength of the decision in *Pennsylvania v. Wheeling.* However, the part of the decision which was depended upon as authority for that proposition was:

> "The prohibition of such a preference does not extend to acts which may directly benefit the ports of one state and only **incidentally** injuriously affect those of another."

In *Armour Packing Co. v. United States, 209 U. S., p. 80,* the Court said:

> "Nor do we think there is any more force in the contention that this legislation amounts to a preference of ports of one State over those of another within the meaning of the constitutional provision under consideration. This provision was intended to prevent legislation intended to give and having the effect of giving preference to the ports of one State over those of another State. It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of this constitutional provision." *South Carolina v. Georgia, 93 U. S., 4, 13; Pennsylvania v. Wheeling & Belmont Bridge Company, 18 How. 421, 433.*

It will be noted that the cases of *South Carolina v. Georgia* and *Pennsylvania v. Wheeling* are quoted as authority for the proposition that:

> "The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of this constitutional provision."

and the meat of the legal proposition, to-wit, the word **incidental** is eliminated from the wording of the decisions relied upon.

It was evidently an oversight as the quotation would have had the same effect had the court used the word incidental.

That was the case where it was sought to show a preference in favor of one port over another on the far-fetched theory that by enacting the Interstate Commerce law and regulating railroad rates, while not regulating the rates of water carriers, that Congress had given a preference to those ports served by waterways.

The Court properly saying that if any preference existed in favor of the ports served by waterways, it was a natural advantage and was not created by the statute.

In an exhaustive well-considered opinion in *Knowlton v. Moore, 178 U. S., pages 103-107*, then Associate Justice Edward Douglas White, in discussing a question of revenue, found it necessary to fully discuss the "preference between ports" clause.

He summarizes in one place as follows:

"The substantial effect of the first clause (preference by regulation of commerce) of the paragraph was to require **that all regulations of commerce** or of revenue affecting commerce **through** the ports of the States should be the same in **all** ports."

And again he summarizes in another place as follows:

"Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of Article 1, and the other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it became plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity, and it also results that the assertion to which we at the outset referred, that the decision in the HEAD MONEY CASES, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception."

The late Chief Justice's opinion is convincing that in regulations of commerce, a **geographical uniformity** must be maintained between ports and they must be the **same** in **all** ports.

This precludes the proposition that all the ports of one state must be preferred over all the ports of another state, because even if the preference is only against one port, the regulations will not be **geographically uniform** nor will the regulations be the **same** in **all** ports.

May we ask if duties, imposts or excises may be so enforced as to build up the business of one port at the expense of another?

In *Gibbons v. Ogden*, Chief Justice Marshall said:

> "The 9th Section of the 1st article declares that 'no preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another'. This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is **expressly applied to commercial regulations**; and the most obvious preference which can be given to **one** port over **another in regulating commerce,** relates to navigation."

It will be noted that Chief Justice Marshall did not seem to view this clause in the light that it is necessary for all the ports to be preferred over all the ports, as he says:

> "And the most obvious preference which can be given to **one port** over **another in regulating commerce,** relates to navigation."

If railroads had existed in that day, he would have said relates to navigation and transportation.

This clause cannot mean that the preference must be in favor of **all** ports of one state over **all** ports of another. It applies alike to regulations of commerce and regulations of revenue, and must be construed the same in relation to both commerce and revenue. If under this clause a regulation of revenue preferring **one** port in one state over **another** port in a different state is not forbidden, then the clause is in conflict with that clause of the Constitution which provides that "duties, imposts and excises must be uniform throughout the United States". Such a construction cannot be accepted when any other is possible.

We have shown that the History of the clause belies the construction that it only forbids a preference of **all** the ports of one state over **all** the ports of another; we have shown that an analysis of the decisions so holding belies such construction; we have shown that the expressions of Chief Justice Edward Douglas White and Chief Justice John Marshall belie such a construction; and we have shown that an analysis of the cause itself belies such a construction.

We believe that a preference which only **incidentally** arises from the exercise of an otherwise legitimate power is not prohibited, provided its **purpose** is not to prefer one Port over another.

And we conclude that what is prohibited is not the incidental preference of one port over another due to the

exercise of another legitimate power of government, but (1) the direct preference of one or more ports in one State over one or more ports in another State under the guise of exercising another legitimate power, and (2) any effort to build up one port at the expense of another by means of regulating Railroad Rates.

The history of the controversy, the parties to this litigation and the evidence in the Record prove the contention that this order is a violation of the provision of the Constitution which forbid preference between ports by regulations of commerce.

(B) The Commission found at page 358 of its report of June 29, 1927, (p. 3379 of printed record) that:

> "Generally speaking, these data show that to Pacific and Atlantic ports in this country, exclusive of Florida, to trans-Atlantic ports, and to the Far East the Texas ports have good service, although perhaps not as dependable or as regular to many of these ports as that obtainable at New Orleans, but that to Mexico, Central America, South America, and Africa there is little or no service at the Texas ports while the service available at New Orleans is fairly good.
>
> The proportion of vessels entering light is greater at Galveston than at New Orleans. This is due to the fact that, the volume and variety of the import traffic being substantially less, the foreign and coastwise traffic is not as well balanced as at New Orleans. The result is an increase in the average unit expense of the general cargo handled. The greater frequency of sailing and generally better service at New Orleans than at the Texas

ports is largely due to the greater variety of commodities handled, both inbound and outbound, and especially to the larger volume of import traffic. Witnesses for steamship lines serving Galveston expressed confidence that an increase in the volume and variety of general cargo through that port would do much to stimulate its steamship service. **Immediately following the original decision herein there was noticeable increased activity on the part of steamship interests at Galveston, and there was in prospect additional steamship service between the Texas ports and various foreign ports, particularly in the Latin America. These activities ceased upon the reopening of this proceeding."**

It proposed by this differential to improve the general cargo traffic of Galveston and thereby improve its steamship service.

But how would it improve Galveston's steamship service?

By better steamship service to the Latin Americas, etc.

But the records show that prior to the order the New Orleans service to the Latin Americas was far superior to Galveston's.

The intent and purpose of forcing the steamships doing business with Latin America entering the port of New Orleans, to enter the port at Galveston is too clear and convincing from the Commission's report to need further mention.

The order would improve Galveston's service to the tropics.

How?

By forcing the vessels which come to New Orleans, or which otherwise would come to New Orleans, to go to Galveston.

It might be argued that it is only forbidden to force vessels bound from one port to call at another through regulations of duties.

So far as the regulation of duties is concerned that was already substantially covered by Section 8

> "that all duties, imposts and excises shall be uniform throughout the United States."

And moreover to ignore the words—enter—clear—would violate that canon of construction mentioned by the late Chief Justice White in *Knowlton v. Moore, 178 U. S., page 87,*

> "and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to **each word** of the Constitution."

And to adopt that construction would be to imagine that what trouble Maryland and its representatives was "where the United States would collect its revenue" and not "what might happen to Maryland's commerce" if it subscribed to the Constitution.

The order violates the provision of Clause 5 of Section 9 of Article 1, providing that no regulation of commerce shall force vessels bound to or from any port to enter and clear at another.

The decree of the Statutory Court should be set aside and the relief prayed for granted.

Respectfully submitted,

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